

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.280 OF 2006
ALONG WITH
CRIMINAL WRIT PETITION NO.281 OF 2006

Shri.M.sundareswaran,]
Age:55 years, Occ.Ex-Bank Manager,]
R/o. Flat No.302, United Enclave,]
7-1-28/4, Leela Nagar, Ameerpet,]
Hyderabad-500 016.]..PETITIONER.
Versus
1. The State of Maharashtra,]
2. The Central Bureau of Investigation]
Anticorruption Branch, Tanna House,]
Near S.P. Mukharji Chowk, Colaba,]
Mumbai.]..RESPONDENTS.

Mr.Sanjeev P. Kadam, Adv. for the Petitioner.
Mr.J.C.Satpute, Adv. for Respondent No.2.
Mr.S.R.Shinde, APP, for the State.
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CORAM : SMT.V.K.TAHILRAMANI, J.

DATED : SEPTEMBER 20, 2007.

(IN CHAMBER, 2:45 P.M.)

DATE OF RESERVING THE ORDER : 7th September, 2007.

DATE OF PRONOUNCING THE ORDER: 20th September, 2007.

ORAL JUDGMENT :-

1. Heard Mr.Kadam the learned Advocate for the petitioner and Mr.Satpute the learned Counsel for Respondent No.2-CBI. Rule. By consent, rule is made returnable forthwith.

2. The petitioner is seeking quashing of the proceedings relating to C.B.I. Special Case No.46

of 1986 and 47 of 1986 in which he is facing prosecution. The said cases under Sections 420, 467, 471 read with Section 5(1) and 5(2) of the Prevention of Corruption Act, 1988 are pending trial before the learned Special Judge for C.B.I. for Greater Mumbai.

3. The petitioner had preferred applications for discharge in the above cases before the learned Special Judge. The said applications came to be rejected by order dated 2.5.2005. The applications were preferred only on the limited ground that no prior sanction was obtained for prosecution of the petitioner and hence on this count alone, the prosecution was illegal and proceedings relating to the same deserve to be quashed.

4. Being aggrieved by the order dated 2.5.2005, the petitioner preferred Criminal Writ Petition No.1590 of 2005 alongwith Criminal Writ Petition No.1591 of 2005 before this Court. By order dated 1.7.2005 the said Writ Petitions came to be rejected. The only limited ground raised in

the said Petitions was whether prior sanction was necessary to prosecute the petitioner or not. No other ground was raised on behalf of the petitioner in the said Petitions.

5. Now, the case of the petitioner is that when both the Writ Petitions came to be heard and rejected, only one aspect of the matter was argued i.e. whether sanction under Section 197 Cr.P.C. was necessary to prosecute the petitioner or not, and the issue of sanction under Section 6 of the Prevention of Corruption Act, 1947 i.e. Section 19 of the Prevention of Corruption Act, 1988 was not argued at that time. Hence, the present Petitions have been preferred on the ground that sanction under Section 19 of the Prevention of Corruption Act was not obtained prior to prosecuting the petitioner or prior to taking cognizance of the case by the learned Special Judge, therefore the petitioner is liable to be discharged.

6. It is made clear that when the earlier Writ Petitions i.e. Cri.W.P.Nos.1590 of 2005 & 1591 of 2005 were rejected by this Court, the issue of

sanction under Section 19 of the Prevention of Corruption Act was not argued and therefore the same was not considered by this Court while passing the order. Hence the petitioner has preferred the present Petitions on the ground that sanction as required under Section 19 of the Prevention of Corruption Act was necessary and as the same was not obtained the petitioner could not be prosecuted and is liable to be discharged.

7. Mr.Satpute, the learned Counsel for Respondent No.2-CBI on the other hand has submitted that this Court cannot go into the issue whether if sanction under Section 19 of the Prevention of Corruption Act was not obtained the petitioner would be liable to be discharged, as it would amount to review of its earlier order dated 1.7.2005 whereby Cri.W.P.Nos.1590/2005 & 1591/2005 came to be rejected. Mr.Satpute submitted that when the order dated 1.7.2005 was passed by this Court,it amounts to final order and this Court cannot alter or review the said judgment. In support of his contention, he has placed reliance on the decision of the Supreme Court in the case

of **State of Kerala Vs. M.M. Manikantan Nair** reported in **2001 CRI.L.J. 2346 (S.C.)**. In the said case, the accused had preferred an application for quashing the criminal proceedings on the ground of want of sanction. The said application came to be rejected. Thereafter, a Misc.Petition came to be preferred for clarification of the said order and the High Court reversed its earlier order and quashed the criminal proceedings for want of proper sanction. The Supreme Court held that this would amount to reversal of order which could not have been done.

8. As far as the present matters are concerned, the same have been preferred on an entirely new ground. The said ground was not urged before the Court when the matter was earlier heard by it nor was it considered by the Court. What was considered by the Court earlier was only the ground of sanction under Section 197 of Cr.P.C. and not the ground of sanction under Section 19 of the Prevention of Corruption Act. The order dated 1.7.2005 was not in any way based on nor did it take into consideration Section 19

of the Prevention of Corruption Act. As the ground was not urged before the Court earlier, it cannot be said that it would amount to review of the earlier order. In the case of **Manikantan Nair** (supra), after the petition was rejected, clarification was sought of the said order by filing a Misc.Petition and the High Court reversed its earlier order and quashed the proceeding. The earlier decision appears to have been reversed on the same set of facts and grounds. However, in the present case a fresh ground has been raised and this Court is not called upon to adjudicate on the earlier issue of sanction under Section 197 of Cr.P.C.. Thus, the decision in the case of Manikantan Nair (supra) would not be applicable to the facts of the present case. Hence, in my view, the present Petitions can be considered.

9. In order to appreciate the rival contentions in this matter, it would be necessary to give few facts relating to this case. The said facts are as under :-

. At the relevant time i.e. in the year

1984, the petitioner was the Branch Manager of Oriental Bank of Commerce, Dadar Branch. By order dated 4.3.1985 the petitioner came to be terminated from service as he had accepted hundis beyond his power as a Manager without necessary permission as required being granted for the same by the higher authorities. The charge-sheet in the present case has been filed on 31.7.1986 and cognizance was taken on the same day i.e. on 31.7.1986 by the learned Special Judge. No sanction to prosecute under Section 197 Cr.P.C. or Section 19 of the Prevention of Corruption Act was obtained prior to filing of charge-sheet or prior to cognizance being taken.

10. Mr.Kadam submitted that the petitioner challenged his termination and this Court by order dated 4.3.1986 directed reinstatement of the petitioner holding that the order of termination of service was *void ab initio* and set-aside the termination. Mr.Kadam contended that once it is held that the order of termination is *void ab initio*, it would mean that the termination order dated 4.3.1985 is set-aside and hence on 31.7.1986

when the charge sheet was filed and cognizance was taken, the petitioner was deemed to be in service and hence sanction in such a case was a must. He submitted that when the charge-sheet was filed and cognizance was taken if there was no prior sanction, the petitioner would be entitled to be discharged. In support of his contention that when an order is set-aside *ab initio* it would restore to the petitioner all the rights of a Government servant during the period the order was in operation, Mr.Kadam placed reliance on a decision of Kerala High Court in the case of **D.V.D'Monte & Ors. Vs. Central Government represented by Dy.S.P., C.B.I. Madras** reported in **1976 CRI.L.J. 589.**

11. Mr.Satpute on the other hand placed reliance on a decision of the Supreme Court in the case of **K.S. Dharmadatan Vs. Central Government and Ors.** reported in **AIR 1979 SUPREME COURT 1495.** In the said case also the accused was a public servant. At the time when the charge-sheet was filed and the Special Judge took cognizance, the accused ceased to be a public servant, therefore,

no sanction was obtained. After conducting departmental enquiry the appellant therein came to be dismissed. Thereafter the appellant therein filed an Appeal before the President of India against his removal from service. The said Appeal came to be allowed. On the appellant being reinstated, it was argued by the learned counsel for the appellant that the logical consequence of the order of the President reinstating the appellant was that he would be deemed to have been put back into service on the date the charge-sheet was submitted against him, and, therefore, at that time he must be deemed to be a public servant within the meaning of the Act. In other words, the learned Counsel imported a legal fiction arising from the Presidential order by which even though factually the appellant may not have been a public servant at the time when the cognizance was taken, he would be deemed to be so by virtue of the Presidential order even though the Presidential order may have been passed years after the cognizance was taken. The Supreme Court after hearing both the sides observed that, "we are unable to agree with the arguments advanced by

the learned counsel for the appellant.". The Supreme Court further observed that :-

"the dismissal of the appellant was not a nullity so as to vitiate all proceedings previous or subsequent. It was merely an order passed by the President in an appeal and the appellant succeeded because of a manifest defect in the charge-sheet. The order passed by the President was therefore not an order on merits. There is nothing to show that the President ever intended that the appellant should be deemed to have been reinstated even for the purpose of S.6 of the Act so as to nullify actions completed, consequences ensued or transactions closed. In fact, when the President observed that the appellant shall be deemed to have been placed under suspension from the date of the original order of dismissal it merely meant that for the purpose of certain

civil consequences flowing from the order of the President, namely, the grant of subsistence allowance or other benefits the order would be deemed to be retroactive in character. It is well settled that a deeming provision cannot be pushed too far so as to result in a most anomalous or absurd position."

. The Supreme Court further observed that,

"Thus, it is well settled that deeming fiction should be confined only for the purpose for it is meant. In the instant case, the order of the President reinstating the appellant and creating a legal fiction regarding the period of suspension must be limited only so far as the period of and the incidents of suspension were concerned and could not be carried too far so as to project it even in cases where actions had already been taken and

closed. In other words, the position seems to be that at the time when actual cognizance by the Court was taken the appellant had ceased to be a public servant having been removed from service. If some years later he had been reinstated that would not make the cognizance which was validly taken by the Court in October, 1970 a nullity or render it nugatory so as to necessitate the taking of a fresh sanction. We, therefore, entirely agree with the view taken by the High Court that in the facts and circumstances of the present case legal fiction arising out of the Presidential Order cannot be carried to nullify the order of cognizance taken by the Special Judge. The argument of the learned counsel for the appellant is, therefore, overruled.

12. In the light of the above decision, even if one takes into consideration the order of this Court dated 4.3.1986 directing reinstatement of

the petitioner, it is seen that the said order was meant only for the purpose of certain civil consequences pertaining to the termination of the petitioner. In the order dated 4.3.1986 there is nothing to show that this Court ever intended that the petitioner should be deemed to have been reinstated even for the purpose of Section 6 of the Prevention of Corruption Act or Section 197 of Cr.P.C. so as to nullify the actions completed, consequence initiated or transactions closed in respect thereof. There is no justification for extending the order dated 4.3.1986 beyond the purpose for which it was intended i.e. regarding termination of service and reinstatement.

13. In addition to the above, Mr.Satpute has placed reliance on the letter dated 18th February, 2005 issued by the Oriental Bank of Commerce, where the petitioner was working as a Branch Manager. This letter had been annexed by the petitioner to his earlier Writ Petitions i.e. Cri.W.P. Nos.1590/2005 & 1591/2005.. The said letter is admitted by the petitioner. Mr.Satpute has pointed out that in the said letter which is

addressed by the Bank to CBI, it is stated that on 31.7.1986 (i.e. the day when charge-sheet was filed and cognizance was taken), the petitioner was not in public service. The said letter further states that the petitioner was terminated from service w.e.f. 4.3.1985 and the petitioner was reinstated in public service on 19.9.1986. Mr.Satpute submits that from this letter it is clear that on 31.7.1986 the petitioner was not in service and as such sanction was not necessary.

14. At this stage, I may also refer to the letter dated 9th September, 1986 which has been addressed by the Oriental Bank of Commerce to the petitioner. The said letter is annexed to the further affidavit filed by the petitioner. By the said letter, the Bank has informed the petitioner that he is reinstated into the service of the Bank and the petitioner is accordingly advised to report for duty immediately to the Regional Manager. It is trite that only when a person joins his duty can it be said that he holds the respective post. Obviously till such time that he

joins, he cannot be said to be in service. A person may chose not to join hence, till he joins he cannot be said to be in service. The petitioner has joined only sometime after 19.9.1986. In such case, on 31.7.1986 when cognizance was taken the petitioner cannot be said to be in service and hence *prima facie* sanction would not be necessary.

15. Mr.Satpute also placed reliance on the decision in the case of **Sat Paul Vs. Inspector of Police & Anr.** reported in **1995 CRI.L.J.2890**, wherein it is observed that :-

"the relevant date with reference to which a valid sanction is sine qua non for taking cognizance of an offence committed by a public servant as required by S.6 of 1947 Act is the date on which the Court is called upon to take cognizance of the offence of which he is accused; and that the terminus a qua for a valid sanction is the time when the Court is called upon to take cognizance of the offence. If,

therefore, when the offence is alleged to have been committed, the accused was a public servant but by the time the Court is called upon to take cognizance of the offence committed by him as public servant, he has ceased to be a public servant on being dismissed from service, no sanction would be necessary for taking cognizance of the offence by a special Judge against him. The subsequent setting aside of the dismissal order during the pendency of a criminal case could neither nullify the cognizance taken by the special Judge. Further the question as to whether the accused had acted or purported to act "in the discharge of his official duty" is of no consequence under such circumstances."

. In view of the above observations, it does appear that even though no previous sanction was obtained on the date when the charge-sheet was filed and cognizance was taken, it would not

..(17)..

affect the prosecution case. Moreover, on the point whether prior sanction under Section 19 of the Prevention of Corruption Act was necessary to prosecute the petitioner or not, in addition to the above more or less the same reasoning would apply which has been taken by this Court in its order dated 1.7.2005 in respect of sanction under Section 197 of Cr.P.C.

16. Looking to the above facts, no case is made out for interference. Rule stands discharged.

(SMT.V.K.TAHILRAMANI, J.)